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Comptroller General
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Matter of: AmClyde Engineered Products Company, Inc.

File: B-282271; B-282271.2

Date: June 21, 1999

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Richard G. Welsh, Esq., Naval Facilities Engineering Command, for the agency.
Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency reasonably evaluated the protester's proposal as acceptable, rather than outstanding, under the capability/relevant past performance subfactor, where the protester's proposal demonstrated extensive relevant experience but the agency received negative past performance information.
2. Protester is not an interested party to protest the evaluation of the awardee's proposal where the protester's proposal was properly rated and there is an offeror whose proposal is higher rated and lower priced than the protester's, because the protester would not be in line for award even if its protest were sustained.
3. Agency did not misuse the pre-award survey process in ascertaining that the awardee's proposal may not comply with a material term of the contract and subsequently conducting discussions to resolve this problem with all competitive range offerors, including the protester.
4. Agency's clarification of the awardee's technically acceptable subcontracting plan after source selection and prior to contract award did not constitute discussions, since the ultimate approval of a subcontracting plan involves a question of responsibility.
5. Agency's best value decision properly did not consider certain factors not contemplated by the solicitation's stated evaluation scheme.

DECISION

AmClyde Engineered Products Company, Inc. protests the award of a contract to Samsung Heavy Industries Company, LTD, under request for proposals (RFP) No. N62472-97-R-1643, issued by the Department of the Navy, Naval Facilities Engineering Command, Navy Crane Center, Lester, Pennsylvania, for the design and manufacture of portal cranes. AmClyde asserts that the proposals were misevaluated and the award selection was improper.

We deny the protest.

The Navy issued the RFP on May 15, 1998, to acquire one 151-ton portal crane for Norfolk Naval Shipyard and up to 20 60-ton portal cranes for various specified shipyards in the United States under a requirements contract. RFP amend. 9, at 2. The contract was for a 5-year base period with three 1-year option periods. *Id.* The design of the 151-ton crane was to be ordered at the time of award, and the remaining requirements were to be accomplished at a rate of no more than four cranes per year.¹ *Id.* The specifications required the cranes to meet detailed design requirements, including the ability to handle nuclear loads. RFP parts N, P. Also, the RFP incorporated the clause at Defense Federal Acquisition Regulation Supplement § 252.247-7023, Transportation of Supplies by Sea, which essentially requires any supplies to be furnished under the contract transported by sea to be transported on United States-flag vessels. RFP § I, at I-3.

The RFP provided for award on a best value basis, price and other factors considered. RFP § M-4. The evaluation factors were price and technical, which were said to be of equal weight. Under technical, the RFP identified three equally weighted subfactors: technical approach, management plan, and offeror's capability/relevant past performance. RFP § M-4.C.B.

The management plan subfactor required, among other things, for offerors to provide a proposed schedule, staffing, and management plan for successfully completing the work within the required timeframes, the identification of major subcontractors, and a description of the quality assurance organization. RFP § M-4.C.B.2. Under this subfactor, an acceptable subcontracting plan for subcontracting with small business, small disadvantaged business and women-owned small business concerns was also required to be submitted and approved. RFP § M-4.C.B.2.f.

¹The schedule separated the work into separate line items, which required offerors to propose individual pricing for each line item. RFP amend. 9, § B.

The offeror's capability/relevant past performance subfactor required offerors to "[l]ist at least three (3) previous projects that were worked on within the past five (5) years that demonstrate [the offeror's] ability to design, manufacture, install and test portal cranes of a similar capacity and complexity." RFP § M-4.C.B.3(a). For this purpose, the subfactor stated that the offeror could "[i]dentify past and current contracts (including Federal, State, local government and private) for efforts similar to the Government requirement." RFP § M-4.C.B.3(c). The subfactor further stated that the references should demonstrate the offeror's record and capabilities in such areas as conforming to specifications, standards of good workmanship, adherence to contract schedules, capability to take corrective action when problems are encountered, and reasonableness of change order pricing. RFP § M-4.C.B.3(b).

Nine offerors submitted proposals in response to the RFP. Five were determined to be unacceptable and rejected, and four, including AmClyde's, Samsung's and [DELETED], which were determined to be unacceptable but susceptible of being made acceptable, were included in the competitive range.² Agency Report at 1. Written discussions were conducted with each of the competitive range offerors. Following discussions, the Navy received revised proposals. One proposal was then eliminated from the competitive range, but the proposals of AmClyde, Samsung, and [DELETED] were determined to be acceptable. *Id.* Although the technical proposals of the competitive range offerors all received acceptable ratings, including acceptable ratings under each evaluation factor, the Navy ranked [DELETED] technical proposal first, AmClyde's second, and Samsung's third. Agency Report, Tab 10, Technical Evaluation Team Report--Revised Proposals, at 27-28.

The Navy then requested final proposals. Samsung submitted the lowest priced proposal at an evaluated price of [DELETED] submitted the next lowest at an evaluated price of [DELETED], and AmClyde submitted the highest at an evaluated price of [DELETED]. Agency Report at 3 and Tab 14, Price Evaluation Team Report--Final Proposals, at 2. The Navy determined that Samsung's proposal represented the best value, but decided to conduct a pre-award survey before making award since it had never seen Samsung's facility or contracted for a crane from that firm. Agency Report at 3.

While conducting the pre-award survey of Samsung's facilities, the Navy verified that Samsung had the requisite capabilities to successfully perform the contract, but discovered that Samsung's proposal, which proposed to manufacture the cranes at its facility in the Republic of Korea, apparently did not intend to comply with the U.S.-flag vessel requirement. Agency Report, Tab 15, Pre-Award Visit Memorandum,

²The proposals were evaluated under an adjectival rating scale under which the rating categories were outstanding, acceptable, unacceptable/susceptible of being made acceptable, and unacceptable. Agency Report, Tab 4, Source Selection Plan, at 15-16.

Jan. 27, 1999. Samsung had intended to utilize a Dutch company to transport the cranes based upon the assumption that it could obtain a waiver of the requirement. Agency Report at 3-4. Since the Navy knew that such waivers are not readily obtainable, it decided to conduct another round of discussions with the competitive range offerors to ensure that they were aware of the U.S.-flag vessel requirement and that offerors had not otherwise based their prices on the mistaken assumption that the Navy would waive this requirement after award. Id. at 4 and Tab 16, Memorandum for File, Feb. 4, 1999.

Following discussions, Samsung again submitted the lowest-priced proposal at an evaluated price of \$115,247,800, [DELETED] was second at an evaluated price of [DELETED], and AmClyde's was third at an evaluated price of [DELETED].³ Agency Report at 4 and Tab 19, Price Evaluation Team Report--Second Final Proposals, at 2.

The Navy again found that Samsung's proposal represented the best value. Agency Report, Tab 20, SSA Determination--Second Final Proposals, Feb. 10, 1999. In doing so, the SSA concluded that there was very little difference between the proposals, although he ranked [DELETED] technical proposal first, AmClyde's second, and Samsung's third. Id. at 1st-2nd unnumbered pages. The SSA noted that Samsung had no experience in building portal cranes for the Navy, but it had significant experience in the design and fabrication of container cranes, and all past performance references were complimentary. Id. at 2nd unnumbered page. The Navy further noted that the pre-award visit confirmed that Samsung had significant experience designing and manufacturing portal cranes, and that it had the facilities, manpower, and demonstrated capabilities to successfully perform this work. With respect to AmClyde the Navy specifically noted that AmClyde had direct experience in the design of portal cranes for the Navy but that "[t]heir past performance history has been weak in customer satisfaction because of failure to meet milestone schedules, reliability problems, documentation inaccuracies and claims." Id. at 2nd unnumbered page. Thus, after considering the merits of each proposal, the Navy found that the significant price advantage associated with Samsung's proposal was not offset by the technical advantages in the other proposals and that Samsung's proposal represented the best value. Id. at 3rd unnumbered page.

AmClyde protests that the Navy's equal ratings of Samsung and AmClyde under the offeror's capability/relevant past performance could not be reasonable. Protest at 4. AmClyde argues that it should have received an outstanding rating because of the considerable relevant experience manufacturing cranes for the Navy presented in its proposal, and that Samsung should have been rated lower since Samsung's proposal

³For reasons not explained in the record, AmClyde's evaluated price is denoted in the source selection document as [DELETED]. Agency Report, Tab 20, Source Selection Authority (SSA) Determination--Second Final Proposals Feb. 10, 1999 at 1st unnumbered page.

did not reflect any direct experience manufacturing nuclear rated cranes to stringent military specifications. Protest at 4-5; Protester's Comments at 2-4.

The determination of the relative merits of proposals is primarily a matter of agency discretion, which we will not disturb unless it is shown to be unreasonable or inconsistent with the stated evaluation criteria. Ricards Int'l. Inc. T-A INFOTEQ, B-277808, B-277808.2, Nov. 21, 1997, 98-1 CPD ¶ 2 at 3. An agency may consider its own experience with an offeror's performance where the solicitation contains past performance as an evaluation factor. The protester's mere disagreement with the agency's judgment does not establish that an evaluation was unreasonable. BFI Waste Sys. of Nebraska, Inc., B-278223, Jan. 8, 1998, 98-1 CPD ¶ 8 at 2.

First, we find that the agency reasonably evaluated AmClyde's proposal. The record establishes that despite AmClyde's extensive relevant Navy crane experience, the Navy rated AmClyde's proposal acceptable under the offeror's capability/relevant past performance subfactor because of several negative comments it received regarding AmClyde's performance on its contracts and because of a general absence of laudatory comments. Agency Report, Tab 5, Technical Evaluation Team Report--Original Proposals, at 56; Agency's Post-Hearing Comments at 6. For example, the Navy explains that certain references that it contacted regarding Navy contracts commented that problems were found with electrical wiring on its cranes; that some of the crane's system components were not well matched causing accelerated degradation; that maintenance manuals for the cranes were inconsistent; that drawing errors were found on the cranes' diesel safety circuit; that AmClyde had problems meeting production milestones and delivery dates; that AmClyde did not respond to warranty work in a timely manner; that AmClyde had problems controlling subcontractors; and that AmClyde charges customers for very small changes and often becomes entangled in legal battles. Agency Report at 7 and Tab 5, Technical Evaluation Team Report--Original Proposals, at 56.

AmClyde has not refuted the specific comments made concerning its past performance, but instead generally argues that the Navy's criticism regarding the reliability of its cranes is suspect because Navy cranes are built based upon the Navy's own specifications and standards. Protester's Comments at 5. Further, AmClyde argues that on one of the complained of contracts AmClyde was one of two principal subcontractors and that many areas, such as the manufacture of additional components, the assembly, erection, testing delivery, and warranty obligations were the responsibility of the prime and the other subcontractor. Id.; Post-Hearing Comments at 5. On that basis, AmClyde maintains that it is likely that the negative comments relate to problems created by the prime and other subcontractor. Id. AmClyde concedes late delivery of some cranes, but argues that the majority of cranes were delivered early and any late delivery can be attributed to the Navy's own actions. Protester's Comments, at 5.

Notwithstanding AmClyde's general disagreement with the negative comments concerning its past performance, we cannot conclude on this record that the Navy acted unreasonably in assigning AmClyde's proposal an acceptable, rather than an outstanding, rating, in the absence of a specific refutation of these comments by the protester.⁴ In this regard, we note that at the hearing the Navy representative testified that one reference reported that it was unwilling to do business with AmClyde again because of its poor past performance. Tr. at 28.

AmClyde argues that the Navy should not have downgraded its proposal for making claims, since this is a mechanism that a contractor is entitled to pursue whenever there is a dispute on the contract and many of AmClyde's claims were meritorious. Supplemental Protest at 2. AmClyde also argues that it was improper for the Navy to cite claims history as justification for a lower rating because the Navy did not provide AmClyde the opportunity to address this concern during discussions. Id. While it is true that the Navy did not mention any concerns regarding AmClyde's claims history with that firm during discussions, we find no basis to conclude that AmClyde would have been entitled to a materially better or an outstanding rating, even if it had been able to eliminate claims history as an area of concern, since the other aforementioned past performance problems still remain. Therefore, we find no basis to object to the agency's evaluation of AmClyde's proposal.⁵

⁴At the hearing conducted by our Office in connection with this protest, the Navy's representative testified that AmClyde's revised proposal following discussions did not adequately address the weaknesses in its past performance noted in the initial evaluation. Hearing Transcript (Tr.) at 68-71. While the protester now argues that it was unable to adequately address the Navy's concerns with its past performance because the Navy did not point to the weaknesses in its past performance with sufficient specificity, Post-Hearing Comments at 5, the protester should have been aware of this argument upon receipt of the agency report and therefore was required to raise this argument within 10 days of that date. See 4 C.F.R. § 21.2(a)(2) (1999). However, except for its specific contention that the concerns about its claims history were not mentioned during discussions, see Supplemental Protest at 1-2, AmClyde did not protest the adequacy of its discussions until its post-hearing comments. Therefore, this protest contention is dismissed as untimely and will not be considered.

⁵While the claims apparently had no impact here, we agree with the protester that, absent some evidence of abuse of the process, agencies should not lower a firm's past performance evaluation based solely on its having filed claims. Contract claims, like bid protests, constitute remedies established by statute and regulation, and firms should not be prejudiced in competing for other contracts because of their reasonable pursuit of such remedies in the past.

Since we find that AmClyde's proposal was reasonably evaluated, we conclude, for the reasons discussed below, that AmClyde is not an interested party eligible to maintain its protests of the evaluation of Samsung's proposal and experience, the alleged inadequacy of the cost realism analysis of Samsung's proposal, or the entitlement of Samsung's proposal to an exemption from the Buy American Act with respect to the design services. Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-56 (1994), only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a). Here, the record shows that [DELETED] technical proposal received ratings on all subfactors, including past performance, identical to AmClyde's and was ranked higher than AmClyde by the agency, and that [DELETED] proposed a lower evaluated price than AmClyde. Agency Report, Tab 20, SSA Determination, at 1st-3rd unnumbered pages. We have found that AmClyde's proposal was properly rated and AmClyde does not contend that the agency misevaluated [DELETED] proposal in any way. This being the case, even if AmClyde were to prevail in these additional arguments, [DELETED], not AmClyde, would be in line for the award. AmClyde therefore lacks the direct economic interest necessary to protest the evaluation of Samsung's proposal and we will not consider these protest grounds further. See OMV Med., Inc.; Saratoga Med. Ctr., Inc., B-281388 et al., Feb. 3, 1999, 99-1 CPD ¶ 53.

AmClyde also protests that the Navy misused the pre-award survey process in order to provide Samsung with the opportunity to modify its nonconforming proposal. It argues that it was improper for the agency to discuss the U.S.-flag vessel deficiency contained in Samsung's proposal with that offeror, since this goes beyond the scope of the pre-award survey process. Supplemental Protest at 3-4.

The record does not support AmClyde's contentions that the agency misused the pre-award survey process. To the contrary, the record shows that the agency properly sought clarification of an aspect of Samsung's proposal that the agency believed did not meet the contract requirements. The Navy then reopened discussions with all offerors in the competitive range while providing Samsung an opportunity to revise its otherwise unacceptable proposal. Since the agency conducted discussions with all offerors providing each an opportunity to revise its proposal, we have no basis to question the agency's actions. An agency, especially following the selection of a contractor for the award as here, may not simply ignore information which suggests that an offeror may perform or intends to perform in a manner different from that reflected in a technically acceptable proposal, since to do so would be improper. See AAA Eng'g & Drafting, Inc., B-250323, Jan. 26, 1993, 93-1

CPD ¶ 287 at 6-7. Thus, the agency properly reopened discussions based on the pre-award survey.⁶

AmClyde next contends that the Navy engaged in improper post-final proposal discussions only with Samsung regarding Samsung's subcontracting plan, and the agency was therefore required to have discussions with all competitive range offerors. Supplemental Protest of Apr. 19, 1999 at 4-5; Protester's Comments at 15-18. We disagree. Our review confirms that Samsung timely submitted a subcontracting plan and that the agency reasonably rated it acceptable prior to award selection. Agency Report, Tab 10, Technical Evaluation Report--Revised Proposals, at 17-18. While the agency had further communications with Samsung regarding its subcontracting plan after the award selection but prior to contract award, these exchanges were merely clarifications to Samsung's otherwise technically acceptable plan. Agency Report, Tab 26, Samsung Subcontracting Plan, at 7 and attached letters. In any event, the ultimate approval of a subcontracting plan relates to an offeror's responsibility, even where the solicitation requests the offeror submit the plan with its proposal. Thus, we cannot conclude that the Navy's actions of ensuring that Samsung proposed an optimum subcontracting plan constituted improper discussions or required that revised proposals be solicited from all offerors. See Kahn Instruments, Inc., B-277973, Dec. 15, 1997, 98-1 CPD ¶ 11 at 10-11.

Finally, AmClyde protests that the agency's best value decision was improper because the Navy did not consider other factors, besides the technical ratings and Samsung's lower evaluated price, that affect the relative benefit to the government of awarding the contract to AmClyde rather than Samsung. Protest at 5-8. For example, AmClyde asserts that the Navy failed to consider the additional costs to the government of administering a contract performed in Korea; the limited participation of small and small disadvantaged businesses in a Korean-performed contract; the schedule risk associated with performing the contract in Korea; delays inherent in shipping cranes from Korea; and the loss of tax revenues to the United States economy. Id. While agencies may generally include such factors in their evaluations and best-value decisions, this is so only if offerors have been informed of that in the solicitation. The RFP here did not inform offerors that the factors that AmClyde raises would be evaluated or considered in making the best value decision. Thus, we find that the

⁶AmClyde also argues that the Navy improperly gained information involving Samsung's ability to manufacture cranes during the site visit. However, it was not improper for the agency to consider such information since the agency had already determined Samsung's proposal was acceptable and should receive the award, and Samsung did not change its proposal at the site survey. See UNICCO Gov't Servs., Inc., B-277658, Nov. 7, 1997, 97-2 CPD ¶ 134 at 10-11; Continental Maritime of San Diego, Inc., B-249858.2, B-249858.3, Feb. 11, 1993, 93-1 CPD ¶ 230 at 7-8.

best-value decision may not be legitimately challenged on these grounds. See San Diego Beverage & Kup, Inc., B-278881, Mar. 24, 1998, 98-2 CPD ¶ 127 at 8.

The protest is denied.

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of the United States